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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1991

FIRST AMERICAN ARTIFICIAL FLOWERS, INC.,

Petitioner,

vs.

ALVIN PROMISEL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

We believe that this case raises important and unresolved issues of federalism, election of remedies, joinder of state claims for purposes of enhanced damage awards, and principles of preemption arising out of the construction of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-624 ("ADEA") by the Court of Appeals. The specific questions presented for review by this Court, therefore, are:

1. Should a federal court, in an action brought under the ADEA, permit the pending of an identical state age discrimination aw, once the decision has been made to proceed pursuant to the ADEA, the only purpose in adding the state cause of action being to obtain compensatory damages not otherwise available under the ADEA?

2. Under the statutory scheme announced under the ADEA, upon the filing of a complaint in a court of competent jurisdiction alleging jurisdiction under the ADEA, does (or should) the language contained in 29 U.S.C. § 633(a) preempt or bar the pending of an identical state age discrimination cause of action to the ADEA cause of action? That is, does a court of competent jurisdiction have the power to entertain the state cause of action once the jurisdiction of the ADEA is invoked?

3. In enacting the ADEA, did Congress intend to limit the damages recoverable in an action brought under the ADEA [29 U.S.C. § 626(b)] to unpaid wages and liquidated damages in cases of willful violations, thereby excluding all other damage remedies, including compensatory damages?

4. Given the statutory scheme announced under the ADEA, particularly the limitation on the types of damages authorized by Congress, and assuming that a district court has the power to pend a state cause of action for age discrimination to an ADEA cause of action, where the pending is sought solely to obtain compensatory damages, does a district court abuse its discretion by pending the state cause of action to the ADEA cause of action?

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APPENDIX

Appendix A — Decision of the United States Court of Appeals for the Second Circuit Dated September 4, 1991 . 1a

No.

In The

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October Term, 1991

FIRST AMERICAN ARTIFICIAL FLOWERS, INC.

Petitioner,

vs.

ALVIN PROMISEL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, First American Artificial Flowers, Inc., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit affirming a final judgment entered in the United States District Court for the Southern District of New York awarding to respondent damages for age discrimination, emotional distress, counsel fees and pre-judgment interest totalling $246,084. The Court of Appeals rendered its decision on September 4, 1991.

OPINION BELOW

Respondent sued petitioner for age discrimination in the United States District Court for the Southern District of New York, invoking the jurisdiction of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(c). In his complaint, respondent also invoked principles of pendent jurisdiction, asserting a cause of action under New York Executive Law § 296, which, in an identical manner to the ADEA, makes it unlawful to discriminate in employment because of age. 29 U.S.C. § 296(a). Respondent sought damages ". . .for back pay and unpaid compensation and an additional amount as liquidated damages, and other compensatory damages as provided by the ADEA, ERISA, and the Executive Law, plus exemplary or punitive damages in the sum of at least $1,000,000, attorney's fees, court costs, prejudgment interest, interest on any judgment herein, judgment for other damages that may be attributable to the unlawful acts and practices of defendant Artificial Flowers, reinstatement of employment, injunctive relief, and such other legal and equitable relief as will effectuate the purposes of the statutes violated and as may be just and proper in the circumstances".

The District Court judge charged the jury that it could award damages for emotional distress as part of the pendent claim under the New York Executive Law, despite reservations as to the statutory validity of the pendent claim.[1] The jury returned a verdict

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1. Judge Goettel, sitting in the District Court, at the charging conference questioned whether or not the submission of the pendent claim was proper, noting: "My own personal feeling is that you should not be allowed to piggyback state claims of this nature with federal claims of this nature, and that one or the other should be the exclusive remedy.

(Cont'd)

in which it awarded damages for lost pay and for emotional distress. It declined to award liquidated damages, specifically noting on the verdict sheet the absence of willfulness.

Thereafter, petitioner moved for a judgment n.o.v., for a new trial and for amendment of the verdict. Respondent filed a cross-motion for pre-judgment interest and for attorney's fees. The motion of petitioner was denied; that of respondent granted. An amended judgment was subsequently entered on October 16, 1990. A notice of appeal was timely filed on November 9, 1990.

The Court of Appeals affirmed the judgment of the District Court in its entirety (Appendix A, *infra* at 1a). In permitting the pending of the state cause of action, the Court of Appeals relied upon *Gibbs v. United Mine Workers*, 383 U.S. 715 (1966). The Court of Appeals, while implicitly recognizing that the only purpose in adding the state cause of action was to procure compensatory damages not permitted under the ADEA, nevertheless rejected the jurisdictional arguments of petitioner: (1) that 29 U.S.C. § 633(a) preempts a plaintiff from invoking state law (in either a state or federal court) once an election to proceed under the ADEA has been made (as was the choice in the case *sub judice*); (2) that under New York law, particularly New York Executive Law § 297, subd. 9, respondent could not have brought his suit in the state courts under state law, having elected to proceed administratively before the EEOC and the New York Division on Human Rights, and, therefore, should not have been permitted to pend his unavailable state cause of action to

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(Cont'd)

However, the Court of Appeals in this circuit has not spoken on that subject and, consequently, I will submit it as a separate question to the jury with separate damages." Judge Goettel, however, declined to charge punitive damages under the New York Executive Law.

his ADEA cause of action;[2] and (3) that even if the power to join the state cause of action existed, under the facts of this case, the court should have declined jurisdiction over the state age discrimination claim since its joinder resulted in jury confusion and produced a result not intended by the ADEA. The Court of Appeals also determined that it would not consider claimed offsets to the award for unemployment compensation and social security benefits received by respondent because those issues had not been raised in the District Court.

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2. The Court of Appeals agreed with petitioner that under case law interpreting § 297(9) of the New York Executive Law, where a party elects to proceed administratively before the New York Division on Human Rights, he cannot file suit in state court while his administrative claim is pending. The Court of Appeals, in the case *sub judice,* resolved this jurisdictional impediment by finding that respondent's state administrative claim had been dismissed for "administrative convenience" and, therefore, under New York law he could sue in state court.

While it is undisputed that the charge before the Division on Human Rights was dismissed about a year after suit was filed under the ADEA, the Court of Appeals overlooked the fact that under New York law, the filing of a claim of age discrimination with *EEOC and* with the Division on Human Rights bars *any* state civil court proceeding under the New York Executive Law. *Scott v. Carter-Wallace,* 147 A.D. 2d 33, 541 N.Y.S. 2d 780 (1st Dept.), *appeal dismissed,* 75 N.Y. 2d 764, 551 N.E. 2d 104 (1989). [Held: A state court is barred by the New York Executive Law from permitting a civil complaint to be filed when the aggrieved chooses to file with the Division on Human Rights and EEOC (and regardless of which complaint is first filed or by whom) and that such filing constitutes an election of remedies of the federal forum. It is to that forum that the grievant should look for his remedies. "[W]hen a grievance is taken to a federal agency, such as the EEOC, ultimate responsibility for its redress will be with a federal court."] The Court of Appeals appears to have overruled the *Scott* decision. In dictum, the Appellate Division in *Scott* further questioned the effect of its ruling on the pending of a Human Rights law claim in federal court. According to *Scott,* under New York law, a state cause of action could not be pended in a federal suit. Therefore, such a claim should not have been permitted in the case *sub judice. See* Nelson, *The Dreaded 'Scott' Decision,* N.Y.L.J., Oct. 28, 1991, page 1, *et seq.*

STATEMENT OF JURISDICTION

The Court of Appeals for the Second Circuit rendered its opinion affirming the judgment of the District Court on September 4, 1991. Jurisdiction in the District Court was predicated upon 28 U.S.C. §§ 1331, 1337 and 1343, and principles of pendent jurisdiction. The cause of action for age discrimination in employment was stated to be authorized by § 7 of the ADEA, 29 U.S.C. § 626(b) which in turn incorporates by reference § 6(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b); § 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132; and New York Executive Law, § 296. Pursuant to 28 U.S.C. § 2101(c), this Court has jurisdiction to grant certiorari to review the judgment of the Court of Appeals and in particular whether the statutory scheme envisioned by Congress in enacting the ADEA, specifically 29 U.S.C. § 626(b), prohibits an award of compensatory damages by the trier of fact, and whether Congress intended, by enacting 29 U.S.C. § 633(a) to preempt or bar consideration of the damages available under state age discrimination laws once an election to proceed under the ADEA has been made by the aggrieved party.

STATUTES INVOLVED

AGE DISCRIMINATION IN EMPLOYMENT ACT

29 U.S.C. § 623. Prohibition of age discrimination

> **(a) Employer practices.** It shall be unlawful for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

29 U.S.C. § 626. Recordkeeping, investigation, and enforcement

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion. The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) therof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 211(b), 216, 217) [29 USCS §§ 211(b), 216, 217], and subsection (c) of this section. Any act prohibited under section 4 of this Act [29 USCS § 623] shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 USC 215) [29 USCS § 215]. Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 216, 217) [29 USCS §§ 216,

217]: Provided, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial. (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act. (2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Secretary; timeliness; conciliation, conference, and persuasion. No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) [29 USCS § 633(b)] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 U.S.C. § 633. Federal-State relationship

(a) Federal action superseding State action. Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.

(b) Limitation of Federal action upon

commencement of State proceedings. In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act [29 USCS § 626] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.
(Dec. 15, 1967, P.L. 90-202, § 14, 81 Stat. 607.)

EMPLOYMENT RETIREMENT INCOME SECURITY ACT

29 U.S.C.S. § 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a)[29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This

section shall take effect on January 1, 1975.

NEW YORK EXECUTIVE LAW

29 U.S.C. § 296. Unlawful discriminatory practices.

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

29 U.S.C. § 297. Procedure.

1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney-at-law, make, sign and file with the division a verified complainti in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the division. The commissioner of labor or the attorney-general, or the chairman of the commission on quality of care for the mentally disabled, or the division on its own motion may, in like manner, make sign and file such complaint. In connection with the filing of such complaint,

the attorney-general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this article, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administration convenience, such person shall maintain all rights to bring suit as if no complaint had been filed. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety-six-a.

STATEMENT OF THE CASE

Respondent, Alvin Promisel, then aged 63, was fired on December 18, 1987 after having worked for petitioner as a sales manager for approximately 23 years. Respondent contended that his discharge was because of his age. In January 1987, respondent sustained a heart injury and was hospitalized. Thereafter, in May 1987, respondent approached the president of petitioner to advise that he could no longer work full time because of his failing health and proposed a part-time arrangement whereby he would work 3 days a week (at a reduced pay) and take 6 weeks vacation annually, of which only 3 weeks would be paid for by petitioner. Petitioner was reluctant to agree to such a part-time arrangement only because respondent's position demanded a full time manager. Respondent, however, convinced petitioner he could fulfill his same responsibilities while part-time as he had when full-time. Petitioner, based upon a 23-year relationship, agreed to try the part-time arrangement with the understanding that if it did not work out, respondent would be replaced by a full-time manager. Petitioner contended that after a six (6) month trial period the part-time arrangement proved unsatisfactory and, on December 18, 1987, it terminated respondent.

On June 6, 1988, respondent filed a charge of discrimination with the New York State Division on Human Rights ("SDHR") and requested that it cross-file a similar charge with the Equal Opportunity Employment Commission ("EEOC"), which it did. EEOC ceded jurisdiction to the SDHR in accordance with 29 C.F.R. § 1626.9. After waiting the required 60 days [29 U.S.C. § 626(d)], and not having received a final resolution of his charge, on November 2, 1988 respondent filed suit in the United States District Court for the Southern District of New York under the ADEA. 29 U.S.C. § 626(c). In addition to alleging a violation of the ADEA, respondent asserted, by way of a pendent cause of action, a violation of the New York Executive Law, § 296(a),

which, in a manner identical to the ADEA, made it unlawful for an employer to discriminate in employment against an employee because of his age. Respondent sought, in addition to back pay and liquidated damages [damages specifically referred to in § 626(b)], compensatory and punitive damages ". . . as provided by the ADEA, ERISA and the Executive Law . . . ."[3] On October 27, 1989, almost one year *after* his federal ADEA suit was filed, the charge filed with the SDHR was dismissed by that agency for purposes of administrative convenience.

The jury was instructed that under the ADEA it could award damages for lost wages and benefits and, if it found that the conduct of petitioner was willful, it could also award liquidated damages. The jury was further instructed that under the New York Executive Law it could award damages for emotional distress.[4]

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3. The District Court did not make any reference to ERISA in its charge to the jury nor did the Court of Appeals refer to that statute. It would appear, therefore, that any ERISA claim, if there in fact was one, was abandoned by respondent at trial and before the case went to the jury.

4. There was virtually no evidence at trial concerning any "emotional distress." Respondent was never hospitalized or under the care of a doctor for any type of distress. Respondent, in point of fact, promptly retired to Florida after his termination and immediately applied for and received Social Security benefits. He made little, if any effort to obtain employment. Moreover, there was considerable testimony at trial that respondent was planning to retire in any event no later than age 65. What makes the damage award for emotional distress disturbing is that the jury specifically found an absence of willfulness on the part of petitioner in firing respondent. It is suggested in this respect that the award of $125,000 for "emotional distress" is nothing less than a disguised punitive damage award and that the jury, because of the confusion between what remedy was available under the ADEA and what remedy was available under the New York Executive Law, ignored the instructions of the court, or at worst, was confused by them, and decided simply to punish petitioner without regard to whether it acted willfully or not.

The verdict returned by the jury awarded respondent $75,622 in lost wages and $125,000 for emotional distress. It specifically concluded the absence of willfulness and declined to award liquidated damages. Thereafter, the District Court denied petitioner's motion for a judgment n.o.v. and for a new trial and granted respondent's motion for attorneys' fees ($35,000) and pre-judgment interest ($10,462.38) making the total judgment $246,084.35.

REASONS FOR GRANTING THE WRIT

The availability of and the particular types of damages which may be awarded under civil rights statutes have long been of great concern to both the Congress and the courts charged with enforcing those laws. *Cf. Carey v. Phipus,* 435 U.S. 247, 55 L. Ed. 2d 252 (1974), concerning whether or not a mere violation of 42 U.S.C. § 1983 entitles the victim of the discrimination to "tort type" damages, or whether there must be proof of actual injury before there can be a recovery; the current proposed or pending amendments to the Civil Rights Act now before Congress addressing the quantum of damages available to victims of various types of discrimination. In each instance, the discussion has centered on the placing of limitations on the quantum of damages which can be obtained in federally authorized civil rights litigation. The concern of both the Congress and the courts in general has been the fear that juries will vent their anger on the perpetrators of civil rights injuries, resulting in verdicts far out of proportion to the actual injury sustained. This case presents still another chapter in this ongoing controversy and concerns the specific question of whether Congress, in enacting a federal cause of action for age discrimination through the ADEA, sought to define the available monetary remedy, to the exclusion of common law remedies which might be also available under state law.

Unlike 42 U.S.C. § 1983, Congress, in enacting the ADEA,

did specify the types of damages which it would permit for violations of that statute. In 29 U.S.C. § 626(b), Congress decreed that for violations of the ADEA, the aggrieved could receive as monetary damages all unpaid wages and liquidated damages, provided that in the latter situation there must first be a finding of a willful violation.[5] The purpose of the liquidated damages provision of 29 U.S.C. § 626, as contrasted with the loss of wages provision, is to compensate a victim of discrimination for damage that is too difficult of proof for compensation. *See generally,* cases collected in 55 A.L.R. Fed. 604, 612-613.[6] Nevertheless, courts of appeal have divided over the question of whether compensatory damages can be obtained under the ADEA. *Rogers v. Exxon Research & Engineering Co.,* 550 F.2d 834 (3rd Cir. 1977), *cert. denied,* 434 U.S. 1022 (1978) [Held: In a suit under the ADEA, there can be no monetary damages for pain and suffering in the nature of emotional distress. The Act does not mention any money damages other than amounts measured by unpaid minimum wages or unpaid overtime compensation and liquidated damages.[7]]; *Walker v. Pettit Construction Company, Inc.,* 605 F.2d 128 (4th Cir. 1979), *pet. for reh. denied sub nom.*

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5. The Act also provides for the granting of such legal or equitable relief as may be appropriate to effectuate the purposes of the Act, such as reinstatement to employment, promotion, front pay, etc. We are here concerned only with the monetary damage aspect of the Act.

6. Liquidated damages are distinguishable from punitive damages, which are intended to punish. Liquidated damages serve as an estimate of damage resulting from the termination of a contract where proof of value is difficult, if not impossible. 22 Am. Jur. 2d, *Damages,* pp. 743-744. Compensatory damages, on the other hand, are damages in satisfaction of, or in recompense for, actual loss or injury sustained. The term "compensatory damage" covers all loss recoverable as a matter of right and includes all damages (beyond nominal damages) other than punitive or exemplary damages. *Id.* at p. 50. Actual damages and compensatory damages are synonomous terms. *Id.*

7. 29 U.S.C. § 216 of the Fair Labor Standards Act is referred to in 29

(Cont'd)

Firth v. Eastern Airlines, 611 F.2d 950 (4th Cir. 1979) [Held: The fact that Congress authorized liquidated damages for willful violations of the ADEA evidences an intent not to permit additional damages such as punitive damages.]; *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981) [Held: Award of compensatory damages for emotional distress in an ADEA action sustained under pendent state law claim without consideration of availability of such damages under the ADEA]. There are, in addition, several district court opinions which address the non-availability of compensatory damages via a pendent state law claim. *Keely v. Citibank, N.A.*, 711 F. Supp. 157 (S.D.N.Y. 1989) wherein Judge Edelstein concluded, in a suit filed under the ADEA and asserting pendent jurisdiction under the New York Human Rights Law (New York Executive Law), that "[t]he combined effect of ADEA and the Human Rights Law in New York is effectively to preclude the filing in federal court of state age discrimination claims pendent to a federal ADEA claim. [cases cited, omitted] . . . Though the result has been called anomalous, it is in fact mandated by the statutory structure and is justified by principles of federalism and comity." 711 F. Supp. at 160-161; *Hensman v. Adams City Dept. of Social Services,* 623 F. Supp. 96 (D.C. Colo. 1985) [Held: pendent state court claim rejected because Congress intended to limit remedies to those specified in ADEA; likelihood of jury confusion in treating divergent legal theories of relief]; *Pascoe v. Hoyle Loudermilk, Inc.*, 614 F. Supp. 546 (D.C. Colo. 1985) [Held: Rejecting pendent state court claim of age discrimination which would permit recovery beyond that authorized by Congress in the ADEA proper since otherwise state claim would circumvent scope of remedies available under ADEA].

(Cont'd)

U.S.C. § 626(b) and provides for a doubling of the unpaid minimum wages as constituting liquidated damages. *Rogers v. Exxon Research & Engineering Co., supra.* The two statutes must be read together. *Platt v. Burroughs Corp.*, 424 F. Supp. 1329 (E.D. Pa. 1976).

None of the authorities cited above, including the Court of Appeals in the case *sub judice*, however, addresses the problem in terms of preemption. This seems unusual, particularly in the light of the language contained in 29 U.S.C. § 633(a), which specifically addresses the federal-state relationship in terms of administration of the statute. Petitioner contends that once a choice is made by an aggrieved party to proceed under the ADEA, the statutory language set forth in § 633(a) (". . . except that upon commencement of action under this Act such action shall supersede any State action.") preempts consideration of any and all remedies available under state law.

In *United Nine Workers of America v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130 (1966), the Supreme Court had the occasion to define the circumstances under which a federal court should exercise jurisdiction over a state claim which, but for the existence of the primary federal cause of action, would not otherwise be maintainable in federal court. The Supreme Court explored pendent jurisdiction in terms of the judicial *power* to consider such claims and, if present, whether or not that *power* should be exercised. Clearly, pendent jurisdiction is a doctrine of discretion, designed to ". . . promote justice between the parties, by procuring for them a surer-footed reading of applicable law . . . ." *Gibbs, supra*, 383 U.S. at 726, 86 S. Ct. at 1139. The question of whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. *Gibbs, supra*, 383 U.S. at 727, 86 S. Ct. at 1139.

In enacting the ADEA, Congress did not preempt the entire area of age discrimination from state regulation. The legislative history is clear that Congress, in enacting the ADEA, permitted the states to enact their own laws against age discrimination. Many states did. *See generally*, 45A Am. Jur. 2d, *Job Discrimination*, § 109-110, pp. 166-168. However, there are differences in pursuing age discrimination claims as between state age discrimination

statutes and the ADEA. *Id.*, § 1337, *et seq.*, pp. 1089, *et seq.* An aggrieved party in New York State could, for instance, if he or she chose, bypass *all* administrative proceedings and simply institute suit in State Supreme Court and, if successful, recover damages for lost income and compensatory damages. However, such a person would lose all benefit of the available administrative remedies, as well as the federal forum. Thus, under the ADEA, there must first be an exhaustion (for 60 days) of the administrative remedy provided through the EEOC and any available state agency before any civil suit can be instituted. And, even then, if the Secretary of Labor decides to bring suit in the name of the aggrieved, the right of the aggrieved to proceed in court is terminated. 29 U.S.C. § 626(c) and (d).

The issue of preemption becomes relevant when the aggrieved elects to proceed under the ADEA and not under state law. This choice of the federal forum could be made for a variety of reasons. If, in fact the choice is made to proceed under the ADEA, then we contend that federal law should be exclusive and preempt state law, particularly where there is a conflict in the available remedy.[8]

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8. The Second Circuit held in the case at bar that the "supersede" language in Section 633(a) of the ADEA means nothing more than a "stay" of state action. *See also, Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044 (2nd Cir. 1982) and *Simpson v. Alaska State Com. for Human Rights*, 423 F. Supp. 552 (D.C.Alaska, 1976), *aff'd*, 608 F.2d 1171 (9th Cir. 1979). A careful analysis indicates that such a conclusion simply cannot stand scrutiny. If, in fact, the state proceedings are "stayed", does that mean that if the ADEA suit fails, the aggrieved can simply return and prosecute the state action? Principles of claim preclusion and estoppel would surely bar such an attempt to obtain a "second bite." Moreover, even if a "stay" of the state administrative proceedings were in effect, how does one then explain the ability of the Division on Human Rights, in the matter *sub judice*, to dismiss the administrative proceeding? One would believe that the stay would bar any such subsequent action by that agency. Simply put, we believe the "stay" rationale, which in turn derives from the comments of Senator Yarborough (Cong. Record,

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This results, then, in a partial preemption.

Preemption is a doctrine which has been readily applied where federal statutes and state policy (either statutory or common law) overlap. This overlapping, which results in two systems, not necessarily in synchronization with one another, asserting control over the same subject matter, is not favored. *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180, 190 (1978), *citing to Bethlehem Steel Co. v. New York Labor Relations Board,* 330 U.S. 767, 775-777 (1947), where it was held that the "little Wagner Acts" were preempted by the NLRA in the interests of developing a national labor policy. And, in *Garner v. Teamsters,* 346 U.S. 485, 498-499 (1953), in asserting the preemptive power of the NLRA of jurisdiction over unfair labor practices also violative of state law, the Supreme Court, in applying the preemption doctrine, noted that the conflict between state and federal laws bearing upon the same subject matter lies in remedies, not in rights. ". . . When two separate remedies are brought to bear on the same activity, a conflict is imminent." *Id.*

In the case sub judice, it is clear that there can only be one cause of action for age discrimination regardless of whether the

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(Cont'd)

November 6, 1967, p. 31251), is misplaced and inappropriate, just as are the comments of the Senator that the language of Section 633(a) ". . . will protect employers, such as those engaged in the transportation industry, from having to defend against a multiplicity of suits in various state courts when they operate simultaneously in several states." *Id.* This latter comment, quite frankly, makes little sense. Simply because Senator Yarborough uses the term "stay" does not necessarily mean that that was what Congress intended in enacting § 633(a). *Toibb v. Radloff,* 501 U.S. ____, 115 L. Ed. 2d 145, 153 (1991). *See also,* 29 U.S.C. § 1144(a), wherein the term "supersede", as used in ERISA, has preemptive connotations. It would make much more sense to apply to the ADEA the ERISA definition of the term "supersede" (*i.e.*, preemption) then to adopt the notion of a "stay" as the Court of Appeals suggests.

claim arises under the ADEA or the New York Executive law or under any other state law which makes it unlawful to discriminate based upon age in employment settings. And, there can (or should) only be one remedy. An aggrieved can, under the statutory scheme envisioned by Congress to remedy age discrimination, choose how he wishes to proceed. He can, if he wants, immediately start suit in state court and, if successful, be entitled to whatever damages state law allows. However, if he chooses the federal prong for relief, and seeks to take advantage of federal law and its conciliation remedies, then, having made that election, he should be bound by the federal remedy. Just as when an aggrieved chooses the state administrative remedy he is precluded from instituting suit in state court, *Scott v. Carter-Wallace, supra,* so, too, once he elects the federal remedy he should be similarly limited. There should be but one remedy where jurisdiction under the ADEA is primary and that is the ADEA remedy.

In enacting the ADEA, Congress has clearly spoken as to remedy. It has set forth in great particularity a specific form of relief for violations of the ADEA. It is axiomatic that to allow damages under the guise of "pended" state law claims permits in through the back door what cannot be gotten in through the front door. Again, it is the same claim in both instances: age discrimination. Since there is but one claim, there should be but one uniform remedy, and that under the ADEA. Otherwise, in an ADEA suit in federal (or state) court, those suing in states having access to compensatory damages are going to be entitled to much greater damages than those in states not permitting compensatory damage awards. Federal uniformity will be lost.

Even if this Court should reject our partial preemption argument and conclude that federal courts enjoy the *power* to entertain such causes of action, it should, nevertheless deny the pending of the state age discrimination as a matter of judicial

discretion. The only purpose of adding the state claim is to obtain damages not otherwise available under the ADEA. Under the *Gibb's* test, the state claim should not be pended. In addition, there is the problem of jury confusion. In the case *sub judice*, the jury found a lack of willfulness and yet awarded damages for "emotional distress" which clearly smack of being a punitive award.[9] Only the confusion of the jury in deciding as between two identical statutes and the differing forums of relief available under each can reasonably account for this anomaly. Moreover, permitting the pending of the state cause of action for age discrimination involves the federal courts deciding state law, an area much better left to state courts. *See* Nelson, *The Dreaded 'Scott' Decision, supra* (wherein the author advances the proposition that the Court of Appeals in the case *sub judice* has effectively reversed *Scott v. Carter-Wallace, supra).*

Finally, pendent jurisdiction should be declined because Congress has defined the outer limits of the relief available under the ADEA. The state claim raises identical fact issues as does the ADEA claim. No new or differing proofs are required to establish relief under the state law. Therefore, the pended claim adds nothing. It is joined only to obtain additional damages. If the Court of Appeals in the instant matter is correct, there is absolutely nothing to prevent parties from suing under the ADEA, pending state causes of action, and obtaining compensatory and (perhaps if allowed by state law), punitive damages. And, it matters not that under state law a civil suit could not be filed if one can subsequently induce the state administrative agency to dismiss the administrative proceeding, something it would probably want to do anyway because of the existence of the civil suit. Instead, the

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9. Judge Goettel, sitting in the District Court, noted in denying the motion n.o.v., "[h]ad I been the trier of fact, I might have found that the actions of the defendant were willful, thereby doubling the award, but I would not have awarded damages for emotional distress in the size voted by the jury."

better course is to say that once the ADEA avenue of redress is selected, the aggrieved is bound by *that* statute and precluded from joining in the identical state cause of action where its only purpose is to obtain damages otherwise not allowed under the ADEA. This exclusion of varying state common law remedies will insure the type of uniformity Congress intended when it enacted § 626(b).

CONCLUSION

The federal district courts and the federal courts of appeal appear to be going in different directions when it comes to defining the available remedy in age discrimination cases. On the one hand, the majority of the district courts and the courts of appeal appear to deny compensatory and punitive damages, limiting recovery to that announced in 29 U.S.C. § 626(b). On the other hand, some courts, including the courts in the case *sub judice,* permit an award of compensatory damages if a state age discrimination cause of action allowing for such damages is pended to the federal ADEA cause of action, thereby effectively negating the congressional intent under what, for all intents and purposes, is a federal cause of action. Principles of federalism and comity would argue strongly against such a result. The decision of the Court of Appeals for the Second Circuit, if allowed to stand, will lead to a proliferation of large damage verdicts in ADEA causes, contrary to the expressed intent of Congress. The decision below should be reviewed by this Court and reversed.

For these reasons, we respectfully pray that a writ of certiorari be granted to review the decision of the Court of Appeals for the Second Circuit and that it be reversed.

Respectfully submitted,

JOHN A. CRANER
CRANER, NELSON, SATKIN &
SCHEER, PA
Attorneys for Petitioner

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 4, 1991

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1339 — August Term 1990

(Argued April 10, 1991 Decided SEP 4 1991

Docket No. 90-7999

ALVIN PROMISEL,

Plaintiff-Appellee,

-v.-

FIRST AMERICAN ARTIFICIAL FLOWERS, INC.,

Defendant-Appellant.

Before: CARDAMONE, MAHONEY AND WALKER, *Circuit Judges*

Appeal from an amended final judgment of the United States District Court for the Southern District of New York (Gerard L. Goettel, *Judge*) awarding Alvin Promisel lost wages and attorneys' fees under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-624 and emotional damages under New York Human Rights Law, N.Y. Exec. Law § 290-301 after a jury trial.

Affirmed.

Appendix A

JOHN A. CRANER, Scotch Plains, NJ (Craner, Nelson, Satkin & Scheer, of counsel) *for Defendant-Appellant.*

JAMES DOLAN, Hicksville, NY, *for Plaintiff- Appellee.*

WALKER, *Circuit Judge:*

Plaintiff Alvin Promisel, a sixty-three year old sales manager, sued his employer First Artificial American Flowers ("First American") under federal and state anti-discrimination statutes after First American fired him in December 1987 and replaced him with a younger man. First American now appeals from a judgment of the United States District Court for the Southern District of New York (Gerard L. Goettel, *Judge*) awarding Promisel lost wages and attorneys fees under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-624 and damages for emotional distress under the New York Human Rights Law, N.Y. Exec. Law §§ 290-301 after a jury trial. First American argues that the district court improperly exercised pendent jurisdiction over the state law claim for emotional distress, and that it was entitled to have the jury's award for lost wages offset by the unemployment and social security benefits that Promisel received. First American also argues that Promisel failed to prove that its reason for firing him was clearly pretextual. We reject each of First American's arguments, and affirm the judgment below.

BACKGROUND

Since this appeal comes to us after a jury verdict in plaintiff's

favor, we view the facts of the case in the light most favorable to that party. Alvin Promisel began working for First American as a seller on commission in 1964, and eventually rose to the position of sales manager, supervising five route salespersons. Promisel had an unblemished work performance and attendance record, and by 1987, when the events prompting this lawsuit occurred, he had greatly expanded the distribution base of the company during his seven years as sales manager.

After Promisel was hospitalized for an irregular heartbeat in January 1987, First American and Promisel reached an agreement, effective May 1987, whereby Promisel would work three days a week at reduced pay, and would take six weeks vacation annually, three of which would be unpaid. Under the agreement, Promisel's duties and responsibilities would remain the same.

Unbeknownst to Promisel, First American had apparently been planning his replacement for a number of months. In January 1987, over Promisel's objection, the company sent another salesman to a business meeting in Puerto Rico in Promisel's place. Promisel objected because he had developed First American's Puerto Rican business and had serviced it for years. In September, without telling Promisel, the company hired Harlan Smith, age thirty, to replace him. Smith was told that he was being hired to replace an "older gentleman" because they were looking for "younger blood," someone who was "young and aggressive." First American asked Promisel to train Smith, and he did so.

On December 18, 1987, the day after Promisel left on his agreed-upon vacation, First American fired him in a letter sent to him at his vacation address. The letter stated that he was being terminated because his part-time arrangement was not working

out. That day, his job was taken over by Smith.

On June 6, 1988, Promisel filed a charge of discrimination with the New York State Division of Human Rights ("SDHR") and with the federal Equal Employment Opportunity Commission ("EEOC"). The EEOC conceded jurisdiction to the Division of Human Rights, pursuant to 29 C.F.R. § 1626.9, and the latter commenced an investigation. After waiting the required 60 days, and having received no resolution of his charge, Promisel filed the instant action in the Southern District of New York (Goettel, *Judge*) under the ADEA, 29 U.S.C. § 626(c). He also asserted violations of New York's Human Rights Law, New York Exec. Law § 296. Promisel's complaint with SDHR was dismissed for administrative convenience on October 27, 1989.

At trial, Judge Goettel instructed the jury that under the ADEA it could only award lost wages and benefits, but that under the pendent New York claim it could award damages for emotional distress. The jury returned a verdict in favor of Promisel for $75,622 in lost wages and $125,000 for emotional distress. First American moved for judgment n.o.v. and a new trial. Promisel cross-moved for interest and attorneys' fees. Judge Goettel denied First American's motions and granted Promisel's. On October 16, 1990, he entered an amended final judgment for lost wages and benefits, emotional distress, and attorneys' fees.

On appeal, First American argues that the court improperly exercised pendent jurisdiction over the New York age discrimination claim and thus lacked subject matter jurisdiction to give an emotional distress damage issue to the jury. First American next asserts that it was error for the district court not to apply unemployment compensation and social security benefits received by Promisel before he reached age sixty-five as an offset

against the lost wages damage award. Finally, First American claims that Judge Goettel erred in denying its motions for summary judgment, a directed verdict, judgment n.o.v and a new trial, because Promisel presented insufficient evidence that he was not fired because First American was displeased with his part-time working arrangement.

DISCUSSION

A. *Pendent Jurisdiction over Promisel's State Age Discrimination Claims*

We note at the outset that First American voices its objection to the court's exercise of pendent jurisdiction over Promisel's state law claim for the first time on appeal. Although we would not normally consider an issue not raised below, the lack of subject matter jurisdiction may be raised at any time, by the parties, or by the court *sua sponte. See* Fed. R. Civ. P. 12(h)(3); *Update Art, Inc. v. Modiin Publishing, Ltd.*, 843 F.2d 67, 72 (2d Cir. 1988); *Dunton v. County of Suffolk*, 729 F.2d 903 (2d Cir. 1984). We therefore must consider the issue.

A federal court's exercise of pendent jurisdiction over plaintiff's state law claims, while not automatic, is a favored and normal course of action. "[I]f, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). A court has the power to exercise pendent jurisdiction over plaintiff's state claims together with his federal claims if they derive from "a common nucleus of operative fact," *id.*, and commonly will exercise it if

"considerations of judicial economy, convenience and fairness to litigants" weigh in favor of hearing the claims at the same time. *United Mine Workers*, 383 U.S. at 726. The availability of pendent jurisdiction was codified in 1990 at 28 U.S.C. § 1367(a), which states that "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Promisel's state law claim under New York Executive Law § 296, which alleges that First American discharged him because of his age, clearly derives from the same nucleus of operative fact as his federal ADEA claim. They both arise from his December 18, 1987, dismissal and replacement by Smith. Yet First American proffers two arguments that Judge Goettel's decision to exercise pendent jurisdiction should nonetheless be disturbed.

First American first argues that 29 U.S.C. § 633(a) prevents a plaintiff from invoking state law in either state or federal court once plaintiff has elected to proceed under the ADEA, as Promisel has done. Second, it argues that New York Executive Law § 297, subd. 9, prevents a plaintiff from maintaining the state law cause of action in "any court of appropriate jurisdiction" once the plaintiff has elected to file a complaint with the SDHR, as Promisel did here. Therefore, according to First American, Promisel is barred from asserting his state claims in federal court as a matter of both federal and state law. We believe that First American has read both 29 U.S.C. § 633(a) and N.Y. Exec. Law § 297 too restrictively.

1. *29 U.S.C.* § 633(a)

29 U.S.C. §§ 626 and 633 read as follows, in relevant part:

Appendix A

§ 626(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction . .

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission.

§ 633(a) Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated.

The structure of this complicated legislative scheme and its accompanying regulations can be summarized as follows. A plaintiff who wishes to bring a discrimination claim under the ADEA must first file with the EEOC. In states such as New York which have their own agencies to investigate and obtain relief for discriminatory practices, however, the EEOC refers all such

complaints to that state agency. *See* 29 C.F.R. § 1626.9. This is because, under § 633(b), a plaintiff in such a state may not bring suit under the ADEA until sixty days after the plaintiff has commenced proceedings with the state agency handling discrimination claims. A plaintiff must therefore begin his suit by filing, either on his own or through the EEOC's referral, with the state agency before the federal ADEA suit can proceed further.

Sixty days after filing with the state agency, a plaintiff may bring a federal ADEA claim. *See* § 633(b). At that point, however, the plaintiff is confronted with § 633(a), which states that the filing of a federal ADEA claim then "supersedes any state action." This court has interpreted the word "supersede" to merely mean "stay," in accordance with the legislative history to the section. *See Dunlop v. Pan American*, 672 F.2d 1044, 1049-50, n. 7 (2d Cir. 1982); H.R. No. 805, 90th Cong. 1st Sess., reprinted in [1967] U.S.. Cong. & Ad. News 2213, 2219, 2224. The section stays, but does not dismiss, the state action during the pendency of the federal court case.

First American argues that § 633(a)'s stay on state action operates to preclude federal courts from considering pendent state claims in federal A.D.E.A. suits, relying on *Pandis v. Sikorsky Aircraft Div. of United Technologies Corp.*, 431 F. Supp. 793 (D. Conn. 1973). That case held that § 633(a) barred a plaintiff from asserting in his federal action state law claims which were pending in front of the Connecticut Commission of Human Rights and Opportunities, stating "[t]he fact that the filing of a federal ADEA lawsuit supersedes and stays any action pending in a state forum is a persuasive indication that it would be inappropriate for a federal court considering a federal ADEA claim to assume pendent jurisdiction over a cause of action grounded in state law." 431 F. Supp. at 796. Allowing a plaintiff to assert a claim in federal

court that would be stayed in state court, First American argues, would allow a "plaintiff to get in through a side door what he could not otherwise get in through the front door."

We believe, however, that both First American and *Pandis* are mistaken in assuming that § 633(a)'s stay provision applies to actions pending in any and all state forums. The "supersede" language comes at the end of a sentence which deals exclusively with the jurisdiction of state *agencies* performing "like" functions in handling age discrimination claims: "Nothing in this chapter shall affect the jurisdiction of any agency of any State . . . except that upon commencement of action under this chapter such action shall supersede any State action." It seems logical to assume then that the "state action" referred to in the supersession provision is the same type of "state action" that is the subject of the first part of the sentence — that of state agencies handling claims of employment discrimination. This is the only variety of state action the section addresses. To read "state action" more broadly to include actions independent of those handled by state agencies — including state court actions — would be to divorce those words from the context in which they appear — a statutory provision recognizing the power of state agencies to handle discrimination claims on their own.

It is not difficult to understand why Congress would have wanted the commencement of an ADEA action, with its required period of EEOC investigation and conciliation, *see* 29 U.S.C. § 626(d), to stay a state agency's own investigation and conciliation of the same claim. Allowing two separate agencies — the EEOC and a state agency — to simultaneously expend scarce resources to investigate the same allegation of discrimination would be unnecessarily duplicative. In fact, the statutory scheme of the ADEA is designed to keep this from happening. When the EEOC

receives a complaint of discrimination — the statutorily prescribed method of beginning every federal suit — it refers the complaint to the plaintiff's state agency to process, if such an agency exists. *See* § 633(b). In referring the complaint, the EEOC defers to that agency's investigation and conciliation process. If that process is not fruitful, i.e. if after 60 days the case is not resolved, then the federal investigation commences. *See 29 U.S.C.* § 626(d)(2). At this point, the state investigation then defers to the federal— its activities are stayed pending the completion of the federal case. *See* § 633(a). At no time, therefore, are the two agencies both attempting to investigate, conciliate, and adjudicate the same complaint.

When viewed in the context of its particular facts, the holding in *Pandis*, if not its dicta, is consistent with our conclusion that § 633(a) stays state administrative proceedings only. Under Connecticut law, the state law involved in Pandis, a plaintiff has no right to commence a judicial proceeding to redress a claim of discrimination. A plaintiff's only access to the courts is by appealing a final order of an administrative tribunal or a dismissal of his complaint from the administrative agency. Therefore when the *Pandis* court applied § 633(a) to stay a state cause of action in federal court that state action would necessarily have been an administrative, not a judicial, proceeding. Also, since the plaintiff in *Pandis* had no available right of direct judicial redress under state law, there was no state cause of action in existence to append to plaintiff's federal court action. In such a situation, a plaintiff would truly be getting through the side door what he would have no right to get through the front door — an action in state court for discrimination. In the present case, however, New York law gives Promisel a right to bring a state court action. We hold therefore that § 633(a)'s stay on state administrative proceedings does not apply to any of his state claims, since none are before

Appendix A

New York's administrative agency.

2. *New York Executive Law* § 297

First American argues next, however, that New York Executive Law § 297 subd. 9's "election of remedies" provision acts to bar a state court action once a plaintiff has chosen an administrative remedy. Therefore, First American argues, if a plaintiff is barred under state law from suing in state court, he should not be able to assert state claims in his federal court proceedings. Again, we also disagree with First American's reading of this statute.

Section 297 states:

> 9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, such person shall maintain all rights to bring suit as if no complaint had been filed.

This provision requires a plaintiff to elect a remedy for a discrimination claim. The plaintiff can bring either an administrative action or a court proceeding, but not both. Once the plaintiff has commenced an administrative proceeding the

plaintiff cannot bring a court action while the administrative proceeding is ongoing. Therefore by the section's terms, Promisel could not bring a state court action while his state administrative action was proceeding.

In applying pendent jurisdiction, federal courts are bound to apply state substantive law to the state claim. *See United Mine Workers*, 383 U.S. at 726; *see also Van Gemert v. Boeing Co.*, 553 F.2d 812, 813 (2d Cir. 1977)("It is the source of the right, not the basis of federal jurisdiction, which determines the controlling law.") This includes any restrictions set by the state on whether a plaintiff may bring a court action regarding the claim. If a state would not recognize a plaintiff's right to bring a state claim in state court, a federal court exercising penden jurisdiction, standing in the shoes of a state court, must follow the state's jurisdictional determination and not allow that clai to be appended to a federal law claim in federal court. *See Hunnewell v. Manufacturers Hanover Trust Co.*, 628 F. Supp. 759, 761 (S.D.N.Y. 1986).

Therefore a federal court cannot exercise pendent jurisdiction over a state claim for age discrimination during an ongoing state administrative proceeding. This is true even when plaintiff's election of an administrative remedy is "forced" by the filing of a federal complaint with the EEOC that is then automatically referred to the SDHR. Under New York law, the EEOC's action is deemed to exercise plaintiff's option for an administrative forum. *See Scott v. Carter-Wallace*, 541 N.Y.S. 2d 780 (1st App Div. 1989); *app. dismissed*, 551 N.Y.S. 2d 903 (1989).

Nonetheless, Section 297 clearly provides that a plaintiff whose complaint before the state agency is dismissed for administrative convenience may seek a court remedy. Here the

administrative complaint was so dismissed. Once this occurred, the "election of remedies" barrier was thereby removed as to state court action, and through pendent jurisdiction, as to federal court action on state claims. Although Promisel had asserted his state claim in his original complaint, he presumably would have been entitled to assert it by amendment upon dismissal of the complaint before the state agency, see Fed. R. Civ. P. 15(a), so his state claim is properly included in the federal litigation. First American concedes that it never moved to dismiss the state claim below.

First American argues, however, that 29 U.S.C. § 633(a)'s bar on state administrative action applies even to action on a plaintiff's request that the administrative action be administratively dismissed, or to an administrative agency's *sua sponte* decision to so dismiss the case. An action to dismiss is "state action," First American asserts, and cannot proceed while the federal action is pending. We disagree. The point of § 633(a) is to guard against duplication of federal and state administrative remedies; its purpose would certainly be served by a state agency's decision to give up its handling of the case. Furthermore, it strains the meaning of "action" to include a state's decision not to consider a case on the grounds of administrative convenience. If anything, this seems to be state *inaction* in the face of plaintiff's desire to pursue a federal remedy.

First American argues, finally, that if plaintiffs are allowed to circumvent the election of remedies provision by moving for administrative dismissals of their administrative complaints after bringing federal lawsuits, this would undermine the operation of the provision. The statutory structure, however, explicitly provides for such administrative dismissals. Even at the request of the plaintiff, the administrative dismissals do not circumvent the

operation of the election of remedies provision. New York courts confronted with a plaintiff's request for an administrative dismissal of his N.Y. Exec. Law § 296 complaint so that state claims could be pursued in an already filed federal action have held that the election of remedies provision for administrative dismissals are "in conformance with regulations, as retaining the complaints by [S]DHR would not advance the State's human rights goals, especially since it would compel the use of scarce State resources where the complainants had the desire and resources to bring the complaints in Federal court." *Eastman Chemical Products Inc. v. New York State Division of Human Rights*, 556 N.Y.S. 2d 571, 572 (1st. App. Div. 1990); *see also Columbian Rope Co. v. New York State Division of Human Rights*, 1991 N.Y. App. Div. LEXIS 8979 (4th App. Div. June 7, 1991); *Giuntoli v. Garvin Guybutler Corp.*, 726 F. Supp. 494, 505 (S.D.N.Y. 1989)(allowing state sex discrimination claims which were administratively dismissed from the State Division of Human Rights after federal suit filed to be brought along with federal suit.); *Martel v. Dean Witter Reynolds, Inc.*, 738 F. Supp. 53 (E.D.N.Y. 1990)(same, with age discrimination claims). We see no need to read in a restriction upon a plaintiff's ability to have such suits dismissed in order to bring state claims in an ongoing federal proceeding where no such restriction exists in the statute, and which New York courts themselves do not appear to contemplate.

For all the foregoing reasons, we hold that the district court was fully empowered to exercise pendent jurisdiction over Promisel's state law claim.

B. *Failure to Offset Promisel's Social Security and Unemployment Payments from his Damage Award*

First American argues that Judge Goettel erred in failing to

offset $4,600 in unemployment benefits and an undetermined amount of social security benefits from Promisel's award of $45,622 for lost wages and benefits. The $75,622 award was premised on the value of wages and benefits Promisel would have received had he continued working for First American until his sixty-fifth birthday. Yet First American points out that if indeed Promise had been working until he was sixty-five, he would not have received unemployment and social security benefits for that period. Therefore if the purpose of his lost wages damage award is to duplicate Promisel's financial situation had he not been fired, the amount of benefits received from unemployment and social security must be deducted from it.

Whether unemployment compensation and social security benefits should automatically be deducted from an award of lost wages has not been answered by this circuit. In *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86-87 (2d Cir. 1983), we upheld the district court's setoff of pension benefits paid by the employer, to the plaintiff employee from the jury's award of lost wages. Without this setoff the employer would, in effect, be paying the employer current wages and retirement or unemployment benefits for the same period. In this case these benefits come not from the employer, but from a collateral public source. While collateral source payments do represent an additional benefit to the plaintiff, we note a sister circuit's view that "[a]s between the employer, whose action caused the discharge, and the employee, who may have experienced other noncompensable losses, it is fitting that the burden be placed on the employer." *Maxfield v. Sinclair International*, 766 F.2d 788, 795 (3d Cir. 1985)(holding that social security benefits should not be set off from ADEA lost wages award), *cert. denied* 474 U.S. 1057 (1986). *See also Meschino v. Int'l. Tel. & Tel. Corp.*, 661 F. Supp. 254 (S.D.N.Y. 1987); *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951)(holding unemployment

compensation payments not deductible from back pay award under the National Labor Relations Act). First American made no objection, however, to Judge Goettel's failure to either charge the jury that they should offset collateral source payments, or to deduct such payments from the award himself. Therefore First American has waived this claim on appeal. *See* Fed. R. Civ. P. 51.

C. First American's Motion for a Directed Verdict, Judgment Notwithstanding the Verdict, and a New Trial

Finally, First American contends that Judge Goettel erred in not granting its motions, respectively, for summary judgment, a directed verdict, judgment n.o.v. and a new trial, because the only permissible conclusion to be drawn from the evidence was that First American terminated Promisel because it was dissatisfied with the part-time work arrangement they had worked out, not because of Promisel's age. We disagree.

Under the familiar test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a plaintiff has the burden of establishing a prima facie case of discrimination. This he can do by showing that he was a member of a protected age group, that he was qualified for his position, and that he was discharged under circumstances giving rise to an inference of discrimination. The employer then has the burden of articulating a legitimate, nondiscriminatory reason for its action. *McDonnell*, 411 U.S. at 802. The burden shifts back at that point to the plaintiff to prove that this reason is pretextual. *McDonnell*, 411 U.S. at 804-05; *see also Texas of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). A plaintiff is not required to show that age was the only determinative factor in the discharge, only that it was a determinative factor, one that made a difference in the decision to terminate the employee. *Benjamin v. United Merchants and*

Appendix A

Mfrs., 873 F.2d 41, 43 (2d Cir. 1989).

In this case, the evidence was sufficient for the jury to reasonably have found as pretextual First American's claim that Promisel was fired because his part time arrangement was not working out, and that at least one of the determinative factors in firing Promisel was First American's desire to replace him with a younger employee. Apart from the age disparity between Promisel and Smith, there was evidence that in September 1987 the later was told that he was needed to replace an "older gentleman" because they were looking for "younger blood." We decline First American's invitation to substitute our judgment on this factual issue for that of the jury, and we affirm Judge Goettel in likewise refusing to do so.

Affirmed.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 CIVIL 7802

Alvin Promisel,

Plaintiff,

-against-

First American Artificial Flowers, Inc.,

Defendant,

AMENDED JUDGMENT

The issues in the above entitled action having been brought on for trial before the Honorable Gerard L. Goettel, United States District Judge with a jury on July 2, 1990, and at the conclusion of the trial, the jury having answered the special verdict form, and in so doing returned a verdict in favor of the plaintiff, it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgment in the sum of $200,622.00, plus Attorney's fees in the amount of $35,000 and interest in the amount of $10,462.38 for a total of $246,084.38 as against the defendant.

DATED: WHITE PLAINS, N.Y.
October 12, 1990

Appendix B

APPROVED;

s/ Gerard L. Goettel
U.S.D.J.

s/ Raymond F. Burghardt
Clerk

Judgment 90.0217-WP

U.S. DISTRICT COURT
FILED
OCT 16 1990
S.D. OF N.Y.